LAKSAMANA REALTY SDN BHD

v.

YEO TIN SANG

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 12-21-1997]
17 JULY 1998

LAND LAW: *Tenancy - Tenancy coupled with equity - Whether such tenancy existed - Whether equitable rights of former tenant transmittable to subsequent tenant - Whether liabilities and encumbrances of previous landlord transmitted to new landlord - Whether lease restricted to 30 years under s. 221(3) National Land Code 1965 - Landlord continued to accept rents even after notice to quit expired - Whether this amounted to waiver of notice - Failure by tenant to plead waiver - Whether tenant may rely on defence of waiver - Subordinate Courts Rules 1980, O. 14 r. 14(1) & (2) – Rules of the High Court 1980, O. 18 r. 12 (1) & (2)*

EQUITY: *Defences - Estoppel - Proprietary estoppel - What has to be shown to invoke defence of proprietary estoppel - Whether equitable rights of former tenant transmittable to subsequent tenant - Whether liabilities and encumbrances of previous landlord transmitted to new landlord*

CIVIL PROCEDURE: *Pleadings - Defence - Action for recovery of immovable property - Whether every ground relied on must be specifically pleaded - Whether defence not pleaded may be relied upon - Subordinate Courts Rules 1980, O. 14 r. 14(1) & (2) - Rules of the High Court 1980, O. 18 r. 12 (1) & (2)*

The plaintiff was the registered owner of five pieces of land ('the land') and the defendant was a ground tenant of certain premises ('the premises') which stood on the land. The defendant bought the premises, but not the land, from the previous owner in 1965 and had been paying a monthly ground rental. Subsequently, the plaintiff bought over the land thereby becoming the registered owner of the land. On 20 July 1994, the plaintiff sent the defendant a notice to quit. The defendant however refused to leave and continued paying the rents and assessments rents. The plaintiff accepted these rents. At the time of buying the land from the previous landowner, not only was the plaintiff aware of there being occupants on the said land but knew that the defendant was the registered owner of the premises.

The issues for the court's consideration were (i) whether a tenancy coupled with equity existed in this case and (ii) the effect of s. 221(3) of the National Land Code on equity.

Held:

[1] In the doctrine of estoppel, the general rule is that where a man by his words or conduct willfully or by negligence causes another to believe in the existence of a certain state of things, and induces him to act on that behalf so as to alter his own previous position, then the former is prevented from denying the existence of that state of facts.

[2] Proprietary estoppel or equitable estoppel cases invariably involve some form of expenditure in the like of expenses spent on renovation, extension or even erecting a building on the legal owner's land. However, recent cases have stretched this doctrine to its seam by propounding that expenditure is no more a necessary pre-requisite. If the defence of equity is raised, it is sufficient if the party to whom the assurance is given acts on the faith of it; and it is for the courts of equity to decide in what way the equity should be satisfied. Pursuant to the acquisition of this equitable right, it would be unconscionable and unjust to allow the plaintiff to evict an estoppel claimant from the land.

[2a] In this case, the defendant had purchased the premises from the previous owner with the previous landowner acquiescing to that transaction. By doing so, the defendant had expended money on the land. The previous landowner remained silent to that transaction and there was no evidence of any objection posed by him. That conduct must have led to an expectation on the part of the defendant that he would be entitled to stay on that land after buying over the building. The fact that he was never disturbed until 1994 was testimony to his belief. On that score, by the depth of the phrase regarding the expenditure, progressive attitude of the courts, and the fact that estoppel is a principle of justice and equity, the purchase of the premises certainly fell within the purview of the doctrine of proprietary estoppel.

[3] The rights of the defendant were statutorily protected as his ownership over the premises was registered. The question of non-registration therefore did not arise. The plaintiff will be bound by the equitable rights of the defendant even though they did not participate in the 1965 transaction. The inaction of the plaintiff upon buying the land and the perpetuation of the tenancy amounted to an acquiescence or recognition of the proprietorial estoppel of the defendant. Thus, a tenancy with equity existed in this case but it was limited to a 30 year period due to the curtailing effect of s. 221(3) of the National Land Code.

[4] A tenancy is terminated at the expiration of the notice to quit, and any waiver of such notice may perpetuate that tenancy or create a completely new tenancy, depending upon the facts. In this case, the plaintiff had accepted rents despite the notice to quit and this may have constituted waiver. However, this issue was never pleaded. Since the legislature has provided special provisions for defences involving immovable properties, the defendant was prevented from raising this defence.

[Appeal allowed.]

Case(s) referred to:

A-G Of Hong Kong & Anor v. Humphreys Estate (Queen's Garden) Ltd [1987] 1 AC 114 ***(cit)***

Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd [1982] 1 QB 84/122 ***(cit)***

Brook v. Trafalgar Insurance Co Ltd [1947] 79 Lloyd's List Law Reports ***(refd)***

Chua Sai Ngoh v. Beh Ai Meng [1955] MLJ 167 ***(cit)***

Commissioners Of The Municipality Of Malacca v. Sinniah [1974] 1 MLJ 77 ***(cit)***

Crabb v. Arun District Council [1976] Ch 179 ***(cit)***

Davenport v. Smith [1921] 2 Ch 270 ***(cit)***

Ganesha Sdn Bhd v. Chua Hock Chye & Ors [1996] 5 MLJ 587 ***(cit)***

Goh Soon Leong v. The Commissioner Of Lands & Ors [1951] 17 MLJ 201 ***(cit)***

Greasley & Ors v. Cooke [1980] 1 WLR 1306 ***(cit)***

Greenwood (Pauper) and Martins Bank Ltd [1933] AC 51 ***(cit)***

EAS Wagner & Another v. Tan Eng Yeow [1947] 13 MLJ 33 ***(cit)***

Ho Wee Cheong v. Ho Poi Yuen [1967] 2 MLJ 150 ***(cit)***

Holee Holdings (M) Sdn Bhd v. Chai Him & Ors [1997] 4 MLJ 601 ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 MLJ 221 ***(cit)***

Inwards & Others v. Baker [1965] 2 QB 29 ***(foll)***

JT Developments Ltd v. Quinn [1991] 62 P & CR 33 ***(refd)***

Keith, Prowse & Co v. National Telephone Company [1894] 2 Ch 147 ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***

Lim Teng Huan v. Ang Swee Chuan [1992] 1 WLR 113 ***(refd)***

Matthews v. Smallwood [1910] 1 Ch 777 ***(refd)***

Meenachi Sundram & Anor v. Kunjan Pillai [1955] 21 MLJ 128 ***(refd)***

Mok Deng Chee v. Yap See Hoi & Ors [1981] 2 MLJ 321 ***(foll)***

Oversea-Chinese Banking Corp Ltd v. Philip Wee Kee Puan [1984] 2 MLJ 1 ***(refd)***

Pascoe v. Turner [1979] 1 WLR CA 431 ***(cit)***

Phang Swee Kim v. Beh I Hock [1964] 30 MLJ 383 ***(cit)***

Pirie v. Richardson [1927] 1 KB 448 ***(cit)***

Plimmer & Anor v. The Mayor, Councillors, and Citizens Of The City Of Wellington [1884] 9 AC 699 ***(cit)***

Ramsden v. Dyson [1866] LR 1 HL 129 ***(folld)***

Re Robinson's Settlement [1912] 1 Ch 717 ***(refd)***

Saadian Karim v. Ong Ting Chai [1996] 5 MLJ 646 ***(cit)***

Siew Soon Wah & Ors v. Yong Tong Hong [1973] 1 MLJ 133 ***(foll)***

Sivasupramaniam v. PP [1968] 1 MLJ 80 ***(cit)***
Superintendent Of Lands and Survey & Anor v. Hamit Matusin & Ors [1994] 3 MLJ 185 ***(refd)***
Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1982] 1 QB 133 ***(refd)***
Territorial & Auxiliary Forces Association Of The County Of London v. Nichols & Parker [1949] 1 KB 35 ***(cit)***
Ward v. Kirkland [1967] Ch 194 ***(cit)***
Willmott v. Barber [1880] 15 Ch D 96 ***(cit)***
Yeap Yok Tee v. Lee Boon Bee [1973] 1 MLJ 3 ***(cit)***

Legislation referred to:
Evidence Act 1950, s. 114(e)
National Land Code 1965, ss. 5, 221(3)
Rules of the High Court 1980, O. 18 rr. 7(1), 8(1), 12(1), (2)
Subordinate Courts Rules 1980, O. 14 rr. 14(1), (2)

Other source(s) referred to:
Atkin's Court Forms, Lord Evershed, 2nd edn 24, pp 50, 263
Interpretation Of Statutes, Bindra's, p 327

For the plaintiff - Fatima Tahir Ali; M/s SF Pang & Chandra
For the defendant - WS Goh; M/s WG Goh & Assoc

Reported by Mariette Peters-Goh & S Dharmendran

JUDGMENT

Suriyadi Halim Omar J:

The plaintiff's statement of claim informatively states that it is the registered owner of five pieces of land, in Town Area XXXVI, in the district of Melaka Tengah, hereafter called the "said land". On a portion of the said land stands a building known as No. 86-J Jalan Semabok, Melaka, hereinafter called the "said premises". As per para. 3 of the statement of claim, the plaintiff admitted that the defendant was a ground tenant of the said premises, and had also been paying its predecessor in title a monthly ground rental of RM11. It was not disputed that the defendant bought the building from the previous owner. Since the plaintiff bought over the land from that previous landowner, the rents were rechannelled to it. On 20 July 1994 a notice to quit was sent by the plaintiff's solicitors to the defendant. Inspite of that notice to deliver vacant possession by 31 August 1994, the defendant still remained on it, even up to the present moment. Whilst staying there, even to date, the defendant continued paying rents for the months of October, November and December 1994, and for the months of January, February, March, April, May and June 1995 (see RR 78 - 79). Apart from those rents, the defendant paid the assessment rates for the period of 4 December 1995 until 28 February 1997. The payment of the assessment rates by the defendant merely confirmed the tenancy, and must be presumed to be regular, unless rebutted (s. 114(e) of the Evidence Act 1950. *Commissioners of The Municipality of Malacca v. Sinniah* [1974] 1 MLJ 77).

As per the decision of the court judge, the above facts were learned Sessions Court Judge, the above facts were adjudged. Having adjudged. Having perused the evidence, I totally agree with his decision and therefore will not interfere with those findings. Perusing the notes of proceedings I noticed that PW1 at RR 32, in no uncertain terms testified that, prior to buying that land from the then landowner, not only was the plaintiff aware of there being occupants on the said land but knew, after a search had been conducted at the Majlis Perbandaran Melaka, that the defendant was the registered owner of the said building. The effect of this evidence is relevant in relation to the registration of an interest (see subsequent prognosis). Additional to the above, the judge found that the defendant had been in occupation of that premises since 1965. That building is the end unit of a row of shophouses on the plaintiff's land, with facilities provided for by the Majlis Perbandaran Melaka. Scrutinising D4, which is the valuation report prepared by Yap & Partners Sdn Bhd, the building is described as a single storey building constructed of a reinforced concrete frame with plastered walls, supporting a timber pitched roof laid over with corrugated asbestos sheets. In a gist, it is a permanent building, with it accomodating a shophouse which opened onto a verendah, three bedrooms, a kitchen together with a dining hall, a bathroom and a toilet.

In the absence of any contrary evidence, the learned Sessions Court Judge correctly assumed that the said shophouse must have been built with the encouragement and approval, or at least without any objection by the previous landowner. Apart from that relevant fact, the previous landowner never took steps to demolish that building or endeavour to determine the tenancy with the previous house owner let alone the defendant. The payment of the rentals, after 1982 until June 1995 to the plaintiff, and the additional payments of the assessment rates until 28 February 1997, confirmed the perpetuation of the tenancy of the ground between the defendant and the plaintiff. As the assumption of the learned judge is similarly substantiated by the available facts, I therefore acquiesce to them.

It could be inferred, without the necessity of having to allude to the findings of the learned Sessions Court judge, that the very preparation of a valuation report by the plaintiff must have been pursuant to a belief held by the latter that the defendant was entitled to some compensation. The act of the plaintiff therefore was anticipatory in nature. Whether it is necessary is another matter.

On that expectation too, the defendant similarly prepared a valuation report to prop up its case.

Before focusing our mind to 20 July 1994, or thereafter, the court must first appreciate what must have transpired in 1965 when the property was bought over by the defendant from the previous house owner, *ie* one Chong Chern

(see D1A). The only available evidence regarding the historical background, is what was extricated from DW1, when in crystal clear terms he clarified that *vide* a sales and purchase agreement dated 14 July 1965, he bought that premises. Perusing RR 35 and RR 38, I am satisfied that the contents of that sales and purchase agreement (D1A) was never disputed, inferring that the plaintiff accepted the legality of the transaction of the said shoplot No. 86J, Semabok, Melaka. What was not allowed to be tendered by the lower court, as reflected by RR 35, was the introduction of the receipt of the payment amounting to RM7,200 dated 5 July 1965, merely on grounds of admissibility. It is a fact that when the defendant bought the property from Chong Chern, the plaintiff was yet to be the landowner, nor was there any evidence before the defendant that would have dissuaded him from purchasing that property. One must bear in mind that, with a mere monthly ground rental of RM11, it would have been an act of entrepreneurial fool-hardiness to buy a property for RM12,200, if at the end of the day, the property would be snatched away without compensation. At a nominal rate of RM11 per month, he would be paying altogether RM132 per year, a pittance compared to having the pleasure of being an uncertain owner of a building. A fixed deposit, at an interest of 10% a year will easily fetch RM1,220. It must be inferred that, the willingness of the defendant to expend a large sum of money was on the expectation, based on the previous land owner's assurance that his stay on that land would be undisturbed for a lengthy period of time. The fact that the previous landowner did not prevent the erection of the building, nor terminate the tenancy with Chong Chern, must have played a major role in persuading the defendant to buy that building. Under s. 5 of the National Land Code the interpretation of land includes "that surface of the earth and all substances forming that surface ..." In the case of *Chua Sai Ngoh v. Beh Ai Meng* [1955] MLJ 167 it was held that houses were part land on which they stood and were thus the property of the proprietor or proprietors of the land. It would have been highly improbable that the previous landowner was unaware of Chong Chern's rights, as he was the registered owner of the land to whom the rents had been paid. By virtue of the fact that statutorily a landowner is also the owner of the house which stood on that land, the consent of the landowner must therefore be obtained first, prior to the erection of any building. That is a prerequisite of the law or the plans submitted to the land office would not be approved (see *Yeap Yok Tee v. Lee Boon Bee* [1973] 1 MLJ 3; *Sivasupramaniam v. Public Prosecutor* [1968] 1 MLJ 80).

The above facts are the stereotype background prevailing in a normal and standard equity case where the legal rights of an owner is insufficient to thwart the inchoate rights of an estoppel claimant. This inchoate right, which is dependant upon the sympathies and interpretation of a judge, is justice that

transcends beyond the perimeters of statutory provisions. This justice, *inter alia,* takes into account the assurance of the legal owner, the reliance on that assurance, the subsequent act or acts of the estoppel claimant, reasonable expectation by the claimant pursuant to that act or acts, a change of position that is detrimental to the latter when the legal owner enforces his legal rights, essence of fair play and conscience. And all this began from the signals that emanated from the conduct and behaviour of the legal owner of that land, be it active or passive.

Whether A Tenancy Coupled With Equity Existed In This Case

Initially I was in a guandry regarding the above legal issue, as the learned counsel for the defendant had insisted that the only issue at large was the quantum of compensation to be paid to the defendant. He further claimed that this legal point was an afterthought and a deliberate attempt to negate what was agreed by the parties. Counsel for the plaintiff indicated otherwise. Due to the vehemence of their stance, I was left with no choice but to allude to the notes of proceedings, in particular the notations of the learned Sessions Court Judge. The learned counsel for the defendant apart from venting his displeasure on the above issue, in no uncertain term canvassed that

1. the National Land Code does not provide for tenancy coupled with an equity;

2. there is no authority to support the contention that equity for a tenant occupying a portion of the landlord's land is limited only to 30 years; and

3. even if there is a tenancy coupled with equity, a bare notice is insufficient to terminate that notice.

Having sifted the evidence and having perused the documents before me, it was with utmost regret that I was unable to locate any indication which supports the assertion that parties had agreed on this legal poser. On that score I had to assume that this point was still in contention even up to the last ebbing seconds of the case. I feel justified in arriving at this conclusion, as, apart from the absence of records in the notes of proceedings, if parties had agreed on that legal poser, surely the learned Sessions Court judge would not have found it especially necessary to studiously research and eventually conclude decisively on this point. He in fact took up three pages to justify his finding (RR 42 - 44) whereupon decided that a tenancy coupled with equity did exist.

Having arrived at that conclusion he proceeded to remark that:

> I am also informed by the Plaintiff's counsel that the Plaintiff has offered to pay compensation in the sum of RM40,000 which is RM18,000.00 short of the valuation done by the Defendant's valuer and that it has been rejected by the defendant.
>
> I am of the humble view that the offer of RM40,000.00 is reasonable for the following reasons ...

Eventhough this piece of information was not recorded in the notes of proceeding, the existence of that supposed offer was admitted by the defendant in the course of the appeal, though was rejected. Two conclusions could be derived from the above statement, first, that the offer of RM40,000 was rejected by the defendant, and secondly that sum was found to be reasonable by the learned judge. On that premise, the issue of compensation therefore is still at large. In the final analysis, my conclusion is that, this appeal relates to whether:

1. the National Land Code provides for tenancy coupled with an equity;
2. this particular case comes within the category of a tenancy coupled with an equity;
3. that equity has been sufficiently satisfied after 30 years had elapsed (s. 221(3) of the National Land Code), in the event the answer to question 1 is yes. For completeness, it must be borne in mind that "satisfaction" towards the equity should not necessarily be measured by ringgit and sen. The plaintiff cannot claim that the RM12,200 paid by the defendant to Chong Chern, was a sum well spent, and the equity well satisfied when he continued with his business there for a meagre ground rental. When the plaintiff entered into the contract to buy that land he knew about the low rentals. Perhaps acquiescing to the justifiability of that RM11 per month rent, continued with it. It could reasonably be implied that that sum was the fair market value then for that area. It is trite too that under s. 26 of the Contracts Act 1950, an agreement to which the consent of the promisor is freely given, is not void merely because the consideration is inadequate (*Phang Swee Kim v. Beh I Hock* [1964] 30 MLJ 383);
4. the judgment sum of RM40,000 to satisfy the equity, was reasonable in the circumstances of the case; and
5. the notice of 20 July 1994 was vitiated by a waiver when the rents were still accepted after the last day of the notice.

Reverting to the facts again, it is inescapable that what the defendant was thinking in 1965, and his reaction pursuant to the prevailing elements then are relevant factors for my consideration. He must have known of the then landlord's assurance in 1965 or at the least knew of his silent acquiescence

over the erection of the building by Chong Chern. Those factors unquestionably must have persuaded him to buy the said premises from the latter. His conviction of an undisturbed stay in that building, was vindicated and fully justified, as not only was there inactivity by the previous landowner pertaining his tenancy, but was allowed to stay on until 1994 even by the plaintiff. The inaction of the plaintiff from 1982, the year the latter obtained the legal ownership, until the day the said notice was issued, must have further created or encouraged an expectation in the defendant that he would be left undisturbed for a very long time. Unfortunately, that was not to be, as his peace was shattered, and a change of fortune ensued, which certainly was detrimental to his financial and social position. It would be impossible, to say the least, for the defendant to demand the return of his money in full from Chong Chern, and similarly unthinkable that the latter would return his monies. From the facts, it may be inferred that it must have been far from the mind of parties in 1965, that the then landowner would sell the property, and endanger the position of the defendant subsequently.

In the doctrine of estoppel, the general rule is that where a man by his words or conduct wilfully or by negligence causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is prevented from denying the existence of that state of facts. To recapitulate, the essential factors giving rise to an estoppel *in pais* (by conduct) are:

1. a representation intended to induce a course of conduct on the part of the person to whom the representation was made;

2. resulting from the representation, an act ensued by the person to whom it was made; and

3. detriment is caused to such person in consequence of that act when the maker of that representation desires to enforce his legal rights (*Greenwood (Pauper) And Martins Bank, Limited* [1933] AC 51; *Territorial & Auxiliary Forces Association Of The County Of London v. Nichols & Parker* [1949] 1 KB 35, 49).

The very elements found in estoppel by conduct are also entrenched in proprietary estoppel. To successfully invoke the defence of proprietary estoppel, it is necessary for the claimant to prove that the legal owner has made a representation or created an expectation that the claimant is or will become entitled to some right or interest in the former's land. As regards the ingredient found in estoppel by conduct, Lord Browne Wilkinson opined in *Lim Teng Huan v. Ang Swee Chuan* [1992] 1 WLR 113 PC at 117:

> ... in order to found a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did: it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make.

Proprietary estoppel or equitable estoppel, which has been invoked by the present defendant, has its springboard all the way back to the case of *Ramsden v. Dyson* [1866] LR 1 HL 129. There Lord Kingsdown enunciated in his dissenting judgment, and which has received judicial approval and extension (*Plimmer and Another v. The Mayor, Councillors, and Citizens Of The City Of Wellington* [1884] 9 AC 699, PC; *Inwards and Others v. Baker* [1965] 2 QB 29; *Mok Deng Chee v. Yap See Hoi & Ors* [1981] 2 MLJ 321) that:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, the court of equity will compel the landlord to give effect to such promise or expectation.

Cases under this doctrine invariably involve some form of expenditure in the like of expenses spent on renovation, extension or even erecting a building on the legal owner's land (*Inwards & Others v. Baker (supra); Goh Soon Leong v. The Commissioner Of Lands & Two Ors* [1951] 17 MLJ 201). In recent times English courts have stretched this doctrine to its seam by propounding that even expenditure is no more a necessary pre-requisite. Suffice if the defence of equity is raised, in that if the party to whom the assurance is given, acts on that faith of it; and it is for the courts of equity to decide in what way the equity should be satisfied (*Greasley & Others v. Cooke* [1980] 1 WLR 1306). Pursuant to the acquisition of this equitable right it would be unconscionable and unjust to allow the plaintiff to evict an estoppel claimant from the land (*Crabb v. Arun District Council* [1976] Ch 179 at 195; *Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133; *Amalgamated Investment & Property Co Ltd (In Liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84/122; *Attorney-General Of Hong Kong & Another v. Humphreys Estate (Queen's Garden) Limited* [1987] 1 AC 114).

A relevant point which has to be addressed is whether, the purchase of that premises (building) by the defendant, could fall within the phrase of "lays out money upon the land" ("expenditure" - mine) as envisaged by *Ramsden v. Dyson (supra).* This is so, as the run of the mill equity cases normally involve the original tenant erecting a building or renovating that building, but not of a

third party buying that building, and who then claims that equitable estoppel. As to whether the rights are transmittable to the new owner/owners, be it the new tenant or new landlord, please refer to the subsequent dissertation. Returning to the issue of that expenditure phrase, the case of *Inwards & Others v. Baker (supra)* takes a front seat for purposes of our discussion. In that case, a father permitted his son to erect a house on his land, and assured him that he would be allowed to stay there as long as he desired. Later the son was asked to leave. Lord Denning MR at p. 36-37 had this to say:

> if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. ... All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there.

So, is the phrase "lays out money on the land", wide enough to cover the present scenario of the defendant purchasing the building from Chong Chern, with the previous landowner at the background, silently acquiescing to that transaction? It is my considered opinion that the answer is in the positive. One must bear in mind that, of late the move by courts seemed to be towards the direction of a much wider equitable jurisdiction, to interfere in cases where the assertion of strict legal rights is found to be unconscionable. Even the strict *Willmott v. Barber* [1880] 15 Ch. D 96 with its five "probanda" has been watered down. In fact Oliver J in *Taylors Fashions Ltd v. Liverpool Trustees Co. (supra)* at p. 154 in strong terms had this to say:

> And Goff L.J. referred again to the judgment in *Willmott v. Barber*, 15 Ch. D. 96 and said, at p. 980:
>
> > But for my part, I share the doubt entertained by Sir Raymond Evershed M.R. in the *Electrolux* case, whether it is necessary in all cases to establish the five tests which are laid down by Fry J, and I agree that the test is whether, in the circumstances, it has become unconscionable for the plaintiff to rely upon his legal right.
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> So here, once again, is the Court of Appeal asserting the broad test of whether in the circumstances the conduct complained of is unconscionable without the necessity of *forcing those incumbrances into a Proscrustean bed constructed from some unalterable criteria.* (emphasis mine).

Sifting the facts of the case, I am unable to differentiate the predicament of Chong Chern with that of the defendant who would immediately acquire the status of a tenant, after buying over that property. No doubt Chong Chern had expended money to build that building, but he was sufficiently reimbursed when the defendant came into the picture. The defendant by so paying had

expended money on the land, so to speak, and had replaced Chong Chern. The previous landowner remained silent to that transaction and there is no evidence of any objection posed by him. That conduct must have led to an expectation, created or encouraged by the latter, in that the defendant would be entitled to stay on that land after buying over that building. The fact that he was never disturbed by anyone until 1994 holds testimony to his belief. On that score, by the depth of the phrase regarding the expenditure, progressive attitude of courts, and the fact that estoppel is a principle of justice and equity, I am satisfied that the purchase of that building will certainly fall within the purview of this doctrine.

As reflected by the above cases, the run of the mill equity cases, normally involve two entities, the original tenant and the landlord. With progress and development, cases have become more complicated in that not only do the tenants change, but so do the landlords. It is therefore worthwhile to consider whether the rights, liabilities and encumbrances of the relevant parties are respectively transmittable, and can be acquired by the new personalities. In the context of this case, I am satisfied that the answer is in the positive. Thomson J in *Meenachi Sundram & Anor v. Kunjan Pillai* [1955] 21 MLJ 128 at 130 had occasion to say this:

> Once such an interest has been created, I fail to see how it can be affected in any way by any change in the ownership of the land in respect of which it has been created ... It is a matter of everyday experience that tenancies are assigned. ... When land is sold, it is sold subject to the interest of third parties including tenants subject perhaps in this country to the proviso that if the tenant's interest is such that it is required to be registered, registration is necessary ... **if the tenant is in possession his title clearly prevails against a purchaser of the land who becomes the registered proprietor.** (emphasis mine)

Similarly in the case of *Mok Deng Chee v. Yap See Hoi & Ors (supra)* SalIeh Abbas FJ (as he then was), had occasion to say at p. 323, "that equity is not lost by the changes made to the house nor by the changes in its ownership".

The rights of the defendant here are statutorily protected, as his ownership over the said premises, was registered with the Majlis Perbandaran Melaka Bandaraya Bersejarah. In fact this evidence was adduced by the plaintiff itself. The question of non-registration therefore does not arise (see *Yeap Yok Tee v. Lee Boon Bee (supra).* In the case of *Siew Soon Wah & Ors v. Yong Tong Hong* [1973] 1 MLJ 133 the appellant landlord terminated a tenancy agreement with the respondent tenant. This tenancy was pursuant to an agreement, where the previous landlord agreed to give a permanent tenancy of the premises "as long as the tenant wishes to occupy" to the respondent tenant. Pursuant to

that agreement the tenant had paid RM8,000 to the appellant in consideration. The property was subsequently transferred by the original proprietor to the present appellant landlord. The latter later terminated the tenancy, followed by an action for recovery of possession of the said premises. The Privy Council in the circumstances of that case, affirmed the Federal Court's decision, and stated that there arose in the respondent tenant's favour an equity or equitable estoppel which protected his occupation of the premises for a period of thirty years. Thirty years was mentioned as their Lordships took cognisance of s. 221(3) of the National Land Code, which promulgates the maximum period for land that could be leased out over a portion of land (*Saadian bte Karim v. Ong Ting Chai* [1996] 5 MLJ 646; *Ganesha Sdn Bhd lwn. Chua Hock Chye & Lain-lain* [1996] 5 MLJ 587; *Holee Holdings (M) Sdn Bhd v. Chai Him & Ors* [1997] 4 MLJ 601).

Apart from the recognition of the Privy Council that 'it was not in the landlord's power to grant the respondent a lease for more than thirty years", the other striking factor about that case were the facts. In the above case, in spite of the property having been transferred to the appellant landlord, a person who was never involved with the initial transaction, the equitable rights of the tenant were still recognised by the Privy Council. In other words, the liabilities and encumbrances which bound the previous landlord were transmitted to the new landlord (appellant), with the latter equally bound by them. By the same argument and analogy, the current plaintiff will be bound by the equitable rights of the defendant even though did not participate in the 1965 transaction.

As regards the defendant who is the subsequent tenant, I am satisfied that the previous landlord, by conduct had acquiesced to the transfer of Chong Chern's equitable rights to the defendant. At no point of time did he attempt to dispute that transaction or right. Similarly when the plaintiff bought the land, the previous arrangement was continued until 20 July 1994. I would construe this inaction and perpetuation of the tenancy by the plaintiff (by conduct) as acquiescence or recognition of that proprietorial estoppel of the defendant. For additional legal analysis of the issue of estoppel by conduct, please refer to my previous discussion. For purposes of this paragraph I deem it sufficient if I merely resort to the following established views. I begin by referring to the remarks of The Master Of The Rolls in *J.T. Developments Ltd v. Quinn* [1991] 62 P & CR 33 at p. 55 where His Lordship said:

> Looking at the matter in the round, I would adopt the language of Lord Denning M.R. in *Panchaud Freres v. Etablissements General Grain Co*. ([1970] 1 Lloyd's Rep. 53 at p. 57) and hold that:

> It is a case of estoppel by conduct. The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct. ...

This conduct may constitute "active" encouragement or even "passive" (silent) acquiescence. But regardless of the form, if the claimant of the proprietary estoppel reacted pursuant to that conduct, under an expectation created or encouraged by the landlord, that he shall have certain interest, and lays out money upon the property, a court will give effect to such promise or expectation (*Inwards & Others v. Baker (supra)*; *Pascoe v. Turner* [1979] 1 WLR CA 431). Ungoed-Thomas J in *Ward v. Kirkland* [1967] Ch 194 at 239, regarding the constitution of conduct commented:

> The fundamental principle of the equity is unconscionable behaviour, and unconscionable behaviour can arise where there is knowledge by the legal owner of the circumstances in which the claimant is incurring the expenditure as much as if he was himself requesting or inciting that expenditure. It seems to me that **abstension as well as a request or incitement can fall within the principle from which the claimant's equity arises.** (emphasis mine)

Having considered the evidence in totality, it is my finding that a tenancy with equity existed, in this case but limited to a thirty year period, due to the curtailing effect of statutory law, as confirmed by case laws.

Effect Of S. 221(3) National Land Code On The Equity

On 20 July 1994 the plaintiff sent a notice to quit as against the defendant, requiring him to vacate the premises by 31 August 1994. In spite of having received that notice the defendant refused to hand over vacant possession of that premises to the plaintiff. In term of years the defendant has resided on the land for no less than 32 years.

Section 221 of the National Land Code reads:

> (1) Subject to the provisions of sections 225 and 226, the proprietor of any alienated land may grant leases of the whole or any part thereof in accordance with the following provisions of this section.
>
> (2) Every lease granted pursuant to this section shall be for a term exceeding three years.
>
> (3) The maximum term for which any lease may be so granted shall be –
>
> (a) ninety-nine years if it relates to the whole of any alienated land, and
>
> (b) thirty years if it relates to a part only thereof.

(4) Every such lease shall be granted by an instrument in Form 15A; and in any case where the lease relates to a part only of any alienated land, there shall be attached to the instrument a plan and description sufficient to enable the part to be accurately identified.

For purposes of our case, sub-s. (3) of s. 221 is highly relevant, as the maximum term for any lease over a portion of the land, is 30 years. On the basis of DW1's evidence, arithmatically past 14 July 1996, the maximum term of thirty years would have been breached, and thenceforth subject merely to a monthly tenancy. To end this new tenancy after the thirty years cycle has expired, a bare notice to quit will suffice. The civil suit filed against the defendant cannot double up as a notice to quit as he is not a trespasser or a bare licensee (*Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 MLJ 221). As the notice to quit served on the defendant was issued on 20 July 1994, with the defendant expected to vacate the premises by 31 August 1994, and with the end of the thirty years period being 14 July 1996, that notice would be about two years short of the maximum. Whether by inadvertance or otherwise, as the rentals were accepted in spite of that notice, thus permitting the defendant to stay on, the position of the plaintiff undeniably had been strengthened by due affluxion of time come 14 July 1996. As the defendant had continued occupying that premises, the latter could not come forward and allege that he had suffered losses. On that argument, as the equity had been satisfied when the thirty year cycle had been exhausted, the defendant therefore is not entitled to any compensation. The fact that that equitable interest was not registered may be a factor against him (see *Holee Holdings (M) Sdn Bhd v. Chai Him & Ors (supra)*. As that thirty years period had expired, that issue is superfluous for this case.

The above argument, apart from the fact that the defendant has stayed on the land longer than thirty years, would be an easy way out for me, as it cannot be disputed that by now the defendant's equity would have been satisfied. As it is, a rather interesting legal point which I cannot afford to ignore, is the flaw to the argument that the last date for the thirty years cycle to end was 14 July 1996. This is so, as by virtue of my earlier assertion that the equitable rights of Chong Chern had been transmitted to the defendant, then it must follow that whatever equitable rights that were acquired by the defendant would be the balance of the unused thirty years. In this case it will be the thirty years minus the length of time already enjoyed by Chong Chern, beginning from the date he expended money to erect that building on that land. At RR 36, when DW1 was cross-examined, he testified that the building had been built six months prior to the signing of the sale and purchase agreement, thus indicating that the building was built sometime around January 1965. On the above argument it will follow that the thirty years period will thus expire sometime in January 1996 and not 14 July 1996.

As I had written much earlier that this appeal also involved the issue of waiver, then two matters require consideration *viz:*

1) whether by so re-accepting the rents the plaintiff had waived the contents of that notice to quit; and

2) the effect of not pleading that defence.

It is trite that any tenancy is terminated at the expiration of the notice to quit, and any waiver of such notice perpetuates that tenancy or create a completely new tenancy, depending upon the facts. In relation to a defence to claim for possession of quarters alleging waiver of forfeiture, *Atkin's Court Forms* 2nd Edn 24 Lord Evershed at p. 263 had this to say:

> A forfeiture arises either on an express provision for re-entry or on breach of a condition. If the lessor, after a cause of forfeiture comes to his knowledge, does any act which constitutes a recognition by him that the relationship of landlord and tenant is still continuing, he will be taken to have waived the forfeiture.

Parker J in *Matthews v. Smallwood* [1910] 1 Ch 777 at p. 786 had occasion to say:

> Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease ...

The above case was approved and applied by Astbury J in *Davenport v. Smith* [1921] 2 Ch 270. It is also the established law that any rents accepted within the period of the notice to quit but not beyond its expiration will not constitute a waiver. Any acceptance of rent after the expiration of the notice to quit will constitute a waiver of that notice. In *Keith, Prowse & Co v. National Telephone Company* [1894] 2 Ch 147 under the heading of Held is found:

> that the agreement created the relation of landlord and tenant, and therefore that the acceptance by the Defendants of rent for a day beyond that on which the notice determining the contract was given operated as a waiver of the notice.

(See also *EAS Wagner & Another v. Tan Eng Yeow* [1947] 13 MLJ 33; *Ho Wee Cheong v. Ho Poi Yuen* [1967] 2 MLJ 150.)

Pursuant to the rules of pleadings, after a statement of claim has been filed, a defendant who disputes his liability for the whole or any part of the claim in an action, may serve on the plaintiff a defence. If none is submitted the court may make an order as it thinks just, including in particular, an order that judgment be entered for the plaintiff. With the inception of statutory laws

which have substantially modified the laws regarding land, and in tandem with the changes, saw the promulgation of the Subordinate Courts Rules 1980. For purposes of this case, O. 14 r. 14(1) and (2) become relevant. These provisions read:

> (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant written law relating to limitation fraud or any fact showing illegality –
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
>
> (2) Without prejudice to paragraph (1), a defendant to an action for the recovery of immovable property must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the immovable property by himself or his tenant is not sufficient.

Pursuant to the above Order (quite similar to O. 18 r. 12(1) and (2) of the Rules of the High Court 1980), a party must, in any pleading subsequent to a statement of claim, plead specifically any matter for example, performance, release any relevant written law relating to limitation, fraud or any fact showing illegality. Discriminatingly enough, Parliament saw it fit to promulgate the above O. 14 r. 14(2), which requires the defendant in an action for recovery of immovable property (land), to plead specifically every ground of defence on which he relies. For purposes of this case, the defendant had sufficiently pleaded the defence of a tenancy coupled with equity, but silent as regards waiver. It is with regret that I have not had the benefit of case laws which are direct in point to guide me as to the effect of the latter not being pleaded. In the case of in *In Re Robinson's Settlement* [1912] 1 Ch 717, Fletcher Moulton LJ at 726 had this to say:

> In this particular case I am of opinion that no formal waiver of the point would be binding because the transaction was illegal. But even in the case of any other ground of defence the not putting it in the pleadings is not a waiver, although it does prevent the defendant from raising it unless the Court allows him to amend, which it will only do if the raising of it would not be unfair to the other side.

Buckley LJ at 727 said:

> Order XIX, r. 15, provides that the defendant must by his pleading do various things, but it names no consequence if he does not do those things. It is not confined, as Mr. Cave contended, to a case where a statute is the thing to be pleaded; it applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising out of the pleadings. ... The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy ...

The remarks of Buckley LJ were approved by Romer J at p. 457 in *Pirie v. Richardson* [1927] 1 KB 448. In the case of *Superintendent Of Lands & Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* [1994] 3 MLJ 185, Peh Swee Chin SCJ at p. 189 had occasion to discuss O. 18 r. 7(1) and r. 8(1) of the Rules of the High Court 1980, where His Lordship remarked:

> A legal result or conclusion of law on facts proved before a court is generally not pleaded but only material facts which would lead to such a result or conclusion. When it comes to a defendant, eg it is not for him to say that he is not liable, eg for a sum claimed, he must also plead when available, eg that the goods were never delivered, or that he had been mistaken for another buyer with a similar name, etc. To merely say that he is not liable for the sum claimed is a legal result which should not, strictly speaking, have been pleaded but only stated in the prayers to the defence, in the form that the claim be dismissed, though it is a normally acceptable and harmless harbinger of some material facts to follow by way of defence.
>
> In the instant case, the defendants merely pleaded a denial of the acquisition of native customary rights claimed by the plaintiffs. This is not enough. They would have to say why; failure to do so would make any evidence of the reason for the denial objectionable at the option of the plaintiffs.
>
> The underlying well-known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party.

In the case of *Brook v. Trafalgar Insurance Company Ltd* [1947] 79 Lloyd's List Law Reports p. 365, the court precluded the raising of a plea of waiver by the defendant, as it was never pleaded. In spite of this plea, being dissimilar to a potential defence that may fall within the purview of a discriminatory provision, similar to O. 14 r. 14(2) of the Subordinate Courts Rules 1980, Scott LJ at p. 367 had this to say:

> To put forward a plea of waiver, whether before breach or after breach, of a condition precedent to the right of action contained in a policy is a very serious step. It is quite obvious that it is essential in the interests of justice that the insurance company in such circumstances should have their attention called before hand to the fact that it is intended to rely on an issue of the kind upon which evidence can be called, and in the absence of an application for leave at the trial to introduce a new issue in that way, I respectfully think that the learned judge was wrong in considering the issue at all.

If courts have been loathe to consider pleas which have not been pleaded, however relevant for normal cases, I would respectfully think that where a defendant seeks to rely on a special ground of waiver in an action for recovery of immovable property, a strict treatment must be accorded to it. This strictness is in fact reflected in the very words of the current provision being discussed *ie*, the above mentioned O. 14 r. 14(2) of the Subordinate Courts Rules 1980. Unquestionably, "if a plain word carries a plain sense in the English language, however, strict the law may interpret it, it will not ignore the ordinary meaning which it carries" (*Bindra's Interpretation Of Statutes* p. 327). He must therefore necessarily plead this specific defence of waiver before being allowed to adduce any evidence in support and reliance of it. In fact in *Atkins's Court Forms* 2nd Edn 24 Lord Evershed at p. 50, with regard to this matter wrote:

> In preparing the defence the normal rules of pleading apply. Formerly a plea that the defendant was in possession of the land by himself or his tenant operated as a denial of the allegations made in the statement of claim, **but this plea is no longer sufficient and the defendant must plead specifically every ground of defence on which he relies**. (emphasis mine)

To wind up on this legal poser, as the defence of waiver was never pleaded, the defendant is thus prevented from raising it, unless permitted pursuant to an amendment application. His chances of success to insert that defence are good, as not only can the plaintiff not allege surprise but may also be sufficiently compensated if the need arises. In the case of *Oversea-Chinese Banking Corporation Ltd v. Philip Wee Kee Puan* [1984] 2 MLJ 1 where an acknowledgement was not pleaded, the Privy Council opined that once that acknowledgement, in that case a letter, was received in evidence without objection, the consideration of the acknowledgement not being pleaded then became immaterial. Similarly in the case of *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10 where an acknowledgment was not pleaded, Raja Azlan Shah CJ (as he then was) at p. 11 para H (right) said:

> But it is a matter of indifference to the court whether the plea of acknowledgment is pleaded in the statement of claim or in the reply ... Since the material facts and circumstances were not pleaded in the statement of claim, it should have been pleaded in the reply. Be that as it may ... we think

> there are materials on the record from which a decision to that effect could be arrived at. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice ...

The plaintiff should be the last person to complain of being taken by surprise, as he was the very entity that introduced that piece of evidence which carry the facts of the expiry date. It could not be heard to object to the obvious, as that material factor was conspicuously within its knowledge. Eventhough the above two cases allowed the issue of acknowledgments be canvassed, inspite of them not being pleaded, those cases are clearly distinguishable as the matters in issue there relate to normal evidential pleas. In the current case, the matter not pleaded involves a specific defence which requires a special and pedantic treatment. As the Legislature has promulgated and provided special provisions for defences involving immovable properties, and have set them apart from the run of the mill civil cases, I therefore must acquiesce to their wisdom. In the *Interpretation Of Statutes (supra)*, at p. 329 is enunciated:

> In the interpretation of statutes the courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect.

On the above grounds, I therefore allow the appeal of the plaintiff and set aside the order of the learned Sessions Court judge with costs.